UNITED STATES
v.
GENE DeZAN ET AL.

A-30515 Decided JUL 1 - 1968

Mining Claims: Common Varieties of Minerals--Mining Claims: Determination of Validity

To determine whether a deposit of building stone or other substance listed in section 3 of the act of July 23, 1955, is of a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar type minerals in order to ascertain whether the deposit has a property giving it a distinct and special value. If the deposit is to be used for the same purposes as other minerals of common occurrence, it must possess some property which gives it special value for such uses which value is reflected in the fact that it commands a higher price in the market place, or it must have some property which gives it value for purposes for which the other materials are not suited.

Mining Claims: Discovery

To satisfy the requirement of a discovery on placer mining claims located for deposits of limestone, dolomite and wollastonite, it must be shown that the deposits can be mined and marketed at a profit.

Rules of Practice: Evidence--Rules of Practice: Hearings--Mining Claims: Contests

Where the evidence relating to the marketability of deposits of minerals of widespread occurrence is inconclusive and is lacking in factual data, the case will be remanded for further hearing to develop the facts essential to a meaningful determination.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A-30515

United States
v.
Gene DeZan et al.

: Riverside Contest
: Nos. 02065 and 02069

: Placer mining claims
: declared null and void

: Affirmed in part; set
: aside in part and remanded

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Gene DeZan and others have appealed to the Secretary of the Interior from a decision dated June 9, 1965, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner declaring the Driftstone Veneer Nos. 1 and 2, Driftwood No. 2 and Blondie Nos. 1 through 6 placer mining claims in secs. 14, 15, 22 and 23, T. 3 S., R. 19 E., S.B.M., California, in the Little Maria Mountains, to be null and void.

The record shows that the Blondie Nos. 1 through 6 mining claims were located by A. C. Sudekum on July 19, 1960, that the Driftstone Veneer Nos. 1 and 2 claims were located on January 14, 1961, and the Driftwood No. 2 on January 16, 1961, by Gene DeZan and others, and that amended location notices for the last three claims listed were filed by Gene DeZan on September 25, 1962.

In two separate actions commenced on October 9, 1962,1/ contests were initiated against all of the claims on charges that:

> "a. The material found within the limits of the claims is not a valuable mineral deposit under Section 3 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 601).
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> "b. Valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws."

1/ Contest No. 02065, in which Gene DeZan, Jean DeZan, Robert Yeager and Louise Yeager were named as contestees, was directed against the Driftstone Veneer Nos. 1 and 2 and Driftwood No. 2 mining claims in secs. 14, 15, 22 and 23. Contest No. 02069, in which A. C. Sudekum and Gene DeZan were named as contestees, was directed against the Blondie Nos. 1 through 6 mining claims in sec. 23.

It is not clear from the record whether or not Robert and Louise Yeager assert a present interest in any of the claims or whether they were more than nominal parties to the contest.

The two contests were subsequently consolidated, and a hearing on the charges was held at Los Angeles, California, on June 25, 1963.

Prior to commencement of the hearing appellants filed motions to dismiss both contests on grounds that the complaints failed to state facts sufficient to constitute a basis for the contests. Those motions were denied by the hearing examiner at the outset of the hearing. (Tr. 3-5.)

From the testimony presented at the hearing it is clear that there are exposed on the mining claims deposits of limestone, dolomite and wollastonite,2/ as well as other rock formations. Part of this mineralization occurs in the form of "driftwood" and "driftstone veneer", decorative stone which is useful in fireplaces, commercial building fronts, house fronts, walls, and similar uses, some of which stone has been removed from the claims. (Tr. 15-18, 68-70.)

In a decision dated January 9, 1964, the hearing examiner found it to be undisputed that the dolomite, wollastonite, limestone and other rock found on the claims occur over a widespread area in the Little Maria and Big Maria Mountains in California and that the driftwood rock which has been removed and marketed from the claims has been used as a decorative building stone in the construction of interior and exterior walls, fireplaces, etc. He further found that building stone suitable for construction purposes which is found in pleasing colors, which splits readily and can be polished satisfactorily, but can be used only for the same purposes as other available building stone is a common variety of building stone not locatable under the mining laws. He found no evidence in the record that driftwood stone possessed any distinct economic value for use as a building stone over and above the general run of such deposits, and he held it to be a "common variety" within the meaning of section 3 of the act of July 23, 1955, 30 U.S.C. § 611 (1964), not subject to location under the mining laws of the United States after the date of that act.

The examiner found that the mining claimants placed additional reliance upon the discovery of deposits of dolomite, valuable for use in the chemical industry, wollastonite, valuable for use in the paint, porcelain and other industries, and chemical and metallurgical grade

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2/ Dolomite is a lime-bearing rock composed of calcium and magnesium carbonates which is used in chemical, construction, agricultural and miscellaneous industries and which occurs extensively in California. (See Ex. P.) Wollastonite is a calcium metasilicate which can be used in the ceramics and paint industries as well as for some other purposes. It is known to occur in at least 35 places in California, but only a few of the occurrences are thought to be capable of yielding commercial quantities of relatively pure mineral. (See Ex. O)

limestone. Since each of these nonmetalliferous minerals is of widespread occurrence, he held, it is necessary to show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and marketed at a profit. He found that this marketability was not established by the evidence 3/ but, rather, that the contestees showed only that markets were being investigated. Since it was not shown that the limestone, dolomite and wollastonite deposits exposed on the claims are marketable, the hearing examiner concluded, those deposits do not constitute valuable mineral deposits within the meaning of the mining law.

In affirming the hearing examiner's determination, the Office of Appeals and Hearings first considered appellants' contention that the contest complaints failed to state any facts and found it to be without merit.4/ It also found that appellants were not prejudiced

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3/ The hearing examiner found that chemical grade limestone deposits exposed on the claims were not shown to occur in such quantity and in such form as to permit economical removal, that wollastonite requires beneficiation at undetermined cost to meet industrial specifications, and that the contestees offered no evidence that the wollastonite or dolomite had been chemically analyzed to determine whether those minerals, as they occur on the claims, are of such chemical composition as to be suitable for industrial uses.

4/ Apart from the fact that section 3 of the act of July 23, 1955, is contained in 30 U.S.C. § 611 (1964), rather than in § 601, as stated in the complaints, a discrepancy which does not appear to have confused anyone, we do not find the statement of the charges to be deficient in apprising the contestees of the grounds for the contest.

We do note that the Government directed its evidence at the hearing primarily toward showing that driftwood and driftstone veneer are common varieties of building stone, while appellants attempted to show that limestone, dolomite and wollastonite are not common varieties of stone. The fact that the parties to the contest did not focus their respective cases on the same issue does not, however, obscure the meaning of, or reflect ambiguity in, the charges of the complaint.

In contesting a mining claim, the Government invariably alleges in one way or another that a valuable mineral deposit has not been discovered within the limits of the claim. The allegation is all-encompassing and is intended to mean that, in the view of the contestant, regardless of what minerals may be found upon the claim, the exposed mineralization does not constitute a valuable mineral deposit within the meaning of the mining laws. The Government may, quite naturally, direct its case toward showing that a particular mineral or formation, which it supposes to be the basis for the claim, does not constitute a valuable mineral deposit, and, in response, a claimant may, quite properly, direct his evidence toward demonstrating that an entirely different material found on the claim constitutes a valuable mineral deposit without attempting to refute the Government's evidence with

by the refusal of the hearing examiner to grant them a second postponement of the hearing in response to their request,5/ pointing out that the hearing examiner, in order to compensate for any possible handicap occasioned by short notice to appellants' attorney, stated that he would hold the record open for a period of 30 days during which a request to submit additional evidence would be received and that appellants thereafter declined to submit further evidence.

After concurring in the hearing examiner's determination that the driftwood stone found on the claims is a common variety of stone, the Office of Appeals and Hearings also agreed with his conclusion that it had not been shown that the limestone, dolomite and wollastonite on the claims could be mined, removed and marketed at a profit. It noted that the record contained no evidence that any work was done for the purpose of developing the claims for any of these minerals except as they may occur in the float rock used as a building material, that there was nothing to show that the claims had been tested to determine the depth and quality of the deposits on any of the claims, and that it was apparent that the appellants were of the belief that the mere presence of such minerals on the claims, coupled with chemical analyses of three samples of limestone from near the surface, was sufficient to demonstrate a discovery. It also found certain additional evidence submitted by the appellants on appeal to be insufficient to warrant remanding of the case for further hearing.6/

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footnote 4 continued

respect to the first material. Should this occur, the proceeding may be made substantially more complex than might otherwise be the case, but the nature of the facts to be established in order to sustain or to refute the allegation of no discovery remains unchanged.

5/ The hearing was initially scheduled for May 22, 1963. Upon the request of appellant Gene DeZan, filed on May 6, 1963, that the hearing "be continued for 60 days, and if that length of time is too long, then for at least 30 days", the hearing was rescheduled for June 25, 1963. A request, filed by appellants' counsel on June 12, 1963, "that the hearing be continued for a reasonable time, so that I may properly prepare to represent the contestees" was denied on June 13, 1963, and was again denied at the hearing. (Tr. 5-6.)

6/ That evidence consisted of:

(1) Two letters dated June 1, 1964, from the Division of Mines and Geology, State of California;

(2) An agreement dated August 21, 1964, whereby Gene DeZan and his wife, Jean DeZan, agreed to convey to Western States Stone Company, Inc., all of their interest in certain mining claims, including the Driftstone Veneer Nos. 1 and 2 and Driftwood No. 2, with a reservation of the right to mine, remove and sell all dolomite and limestone deposits found on the claims;

In their present appeal, appellants attack the decisions of the hearing examiner and of the Office of Appeals and Hearings from a number of directions. Initially, they broadly assert that there is no competent evidence in the record to support either of the major conclusions of those decisions, i.e., (1) that the building stone deposits on the claims are of a common variety within the meaning of section 3 of the act of July 23, 1955, and (2) that the deposits of limestone, wollastonite and dolomite on the claims have not been shown to be of sufficient quantity and quality to constitute a valuable mineral deposit within the meaning of the mining law. More specifically, they challenge the competency of the Government's sole witness, Michael E. Ryman, a mining engineer employed by the Bureau of Land Management, to testify as an expert that the stone found on the claims is a common variety, pointing out that the witness admitted that he knew nothing of the characteristics or the market value of the driftstone veneer found on the claims and that his testimony as to the value of building stone on the market was based entirely upon hearsay. Furthermore, they assert, the Government's witness admitted that there are large deposits of limestone, dolomite and wollastonite on the claims. With respect to the marketability of those deposits, appellants argue that there is

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footnote 6 continued

(3) A deed between the same parties dated September 3, 1964, carrying out the terms of the agreement of August 21: and

(4) A letter to appellants' attorney from the Western States Stone Co., Inc., dated September 14, 1964, advising that "there is a vast market that can be developed for the limestone for masonry purposes."

The letters from the Division of Mines and Geology were to the effect that most of the massive white limestone on the Driftwood and Driftstone Veneer claims is very low in impurities and meets the specifications for glass, that limestone deposits of this quality are rare and cannot be classed as a common variety, and that it cannot be said that no market exists for white limestone in the Midland and other desert districts of California.

The Office of Appeals and Hearings found the letters from the Division of Mines and Geology to be "cumulative of the evidence adduced at the hearing," and it found the remaining documents to be void of evidence of the quality or quantity of the wollastonite, dolomite and limestone deposits on the claim.

both a present and a future prospective market for the deposits and that the Government's witness admitted that there would undoubtedly be a market for the limestone around the Brawley area for use in sugar refineries and that there is also a considerable market for limestone in southern California for other purposes. Appellants also reiterate their contention, raised from the outset of the proceeding, that it was an abuse of discretion to deny their motion for a continuance of the hearing, asserting that the initiation of contest proceedings in this case, almost immediately after the mining claims were located, denied them the opportunity normally afforded a mining claimant, and reasonably to be expected, to explore both the claims and the market possibilities.

In some measure, appellants' arguments reflect an intertwining of the concepts of "common varieties" and of "marketability" in an attempt to weave an irrefutable showing that the mineral deposits found on their claims are not "common varieties" and that they are marketable. In order to place the issues of this case in proper perspective, it is important to understand the significance of a finding that a particular mineral deposit is a "common variety" and of a finding that it is a mineral of widespread occurrence the marketability of which must be shown and the distinction between the concepts embodied in the respective findings.

Since July 23, 1955, deposits of common varieties of sand, stone, gravel, etc., have not been deemed to be valuable mineral deposits within the meaning of the mining laws and have not been subject to location under those laws but have been subject to disposition under the Materials Act of July 31, 1947, as amended, 30 U.S.C. §§ 601-604 (1964). The Department has held that common varieties of building stone are included in the common varieties of stone removed from operation of the mining laws by section 3 of the act of that date, and this interpretation of the statute has recently been approved by the Supreme Court in United States v. Coleman, 390 U.S. 599 (1968).

The Department has long employed the test of marketability as one of the criteria for determining whether or not a valuable mineral deposit has been discovered. That is, in order to be valuable, minerals must be marketable at a profit. This test has also received judicial sanction as a proper complement to the long-accepted prudent man test of discovery.7/ See United States v. Coleman, supra; Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959).

7/ "[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of * * * [a discovery] have been met." Castle v. Womble, 19 L.D. 455 (1894); Chrisman v. Miller, 197 U.S. 313 (1905); Cameron v. United States, 242 U.S. 450 (1920); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963).

Economic value, per se, is not determinative of what constitutes a common variety of mineral. That is, a determination that a particular deposit consists of a common variety of mineral does not necessarily connote the absence of economic value, and proof that a mineral deposit can be mined and marketed at a profit does not, ipso facto, remove that deposit from the category of "common varieties". See United States v. Mary A. Mattey, 67 I.D. 63 (1960); United States v. E. M. Johnson et al., A-30191 (April 2, 1965). If the mineral is a common variety, so far as its locatability after July 23, 1955, is concerned, its marketability is immaterial. Marketability comes in issue only if the mineral is locatable.

The Department has interpreted section 3 of the act of July 23, 1955, as requiring a deposit of an uncommon variety of sand, stone, etc. to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. In applying these criteria, the Department has held, there must be a comparison of the deposit under consideration with other deposits of similar materials. It must have some property which gives it value for purposes for which the other materials are not suited, or if the deposit is to be used for the same purposes as other minerals of common occurrence, it must possess some property which gives it a special value for such uses which value is reflected by the fact that it commands a higher price in the market place. Differences in chemical composition or physical properties are immaterial if they do not result in a distinct economic advantage of one material over another. See United States v. U.S. Minerals Development Corporation, 75 I.D. ___ (A-30407, April 30, 1968), and cases cited.

Applying these criteria to the facts of this case, we find the determination of the hearing examiner and of the Office of Appeals and Hearings that driftwood stone and driftstone veneer are common varieties of building stone to be fully supported by the evidence of record.

The Government's witness, Ryman, testified that driftwood stone occurs over wide areas of the surrounding country and that it is readily available and is sold to contractors and in stone yards all the way from Blythe to Los Angeles. (Tr. 21-24.) He further testified that each of the decorative stones on the market has certain unique characteristics of color or texture that make it slightly different from the others and allow people to choose the stone they like, that basalt, a very common material coming from the Newberry to Baker area, brings from $18 to $20 delivered in Los Angeles stone yards, that calcareous tuffa, which is found all around the edges of Searles Lake, brings about $20 a ton delivered in Los Angeles, and that driftwood stone brings a similar price, "ranging from $12 to $20, depending on who is selling it. It commands no premium price, and it is used for the same

uses that all of these other stones are." (Tr. 27-28, 29, 31.) Ryman testified that driftstone veneer is another decorative stone, that it is slabby and would take fewer tons to cover a given area than would be required of driftwood stone which is more blocky but that he was without knowledge of the market for it, the price which it might bring, or of any operation on it, except that appellant Gene DeZan indicated that he had tried to develop a small market for it. (Tr. 24, 29, 31.)

Appellants have, from the outset, challenged the competency of this testimony as evidence that the deposits found on the claims are of a common variety of building stone, and they now assert that the Government's witness attempted to apply the marketability test in order to support his opinion that the stone is a common variety. Appellants err somewhat in their concept of the Government's case. The Government's evidence relating to market values was introduced not for the purpose of showing that the driftwood stone on the claims could not be profitably removed and sold but for the purpose of showing that it possessed no greater value than other common varieties of stone which are used for the same purposes. If appellants believed the Government's witness to be incompetent to testify with respect to comparative market values of various types of building stone, as they have alleged that he was, they could best refute his testimony by the testimony of other witnesses who were competent. Such refutation has not been forthcoming either at the hearing or in appellants' subsequent appeals.8/

Appellants' only response to the contestant's evidence relating to the nature of the deposits was the following testimony given by appellants' witness Blair W. Stewart, a consulting mining engineer, on cross-examination:

> "Q. [by Mr. Wheatley, counsel for the Government] Do these stones contain any special qualities, properties, or characteristics which would make them more valuable for building stone than other types of building stone available in the market?

8/ Appellants have attempted to make much of Ryman's acknowledged lack of knowledge with respect to the market value of driftstone veneer, but they have presented no evidence on that question themselves. So far as can be ascertained from the record, Ryman's inability to compare the value of that material with the value of other similar materials reflects the lack of any market for the material, not ignorance of the market on the part of the witness. The lack of a basis for value comparison can hardly be relied upon as evidence that rock is not of a common variety. Were it to be so regarded, all rock of a type that has never been sold would be locatable as mineral.

A. Yes. For ornamental facings, and for concrete slabs, for pushup buildings, they use the wollastonite in that, which is very strong, much stronger than the cement itself, mixed with the cement and also with the reinforced steel.

Q. Now you are speaking of the processing of this material?

A. No, I am not. I am speaking of what you call your driftstone, the stuff they are bringing in trucks. This is used on the outer walls, but it is part of the building and it is part of the structure of the building. You've probably seen them.

Q. The chemical content of this float material, or this face material we spoke of, does it add to the quality of the stone over and above other building stones?

A. It's tougher and it's harder, yes.

Q. Other building stones serve the same purpose, however, do they not?

A. They could.

Q. Then this is not a unique building stone?

* * *

The Witness: I would say that it is a unique building stone.

By Mr. Wheatley:

Q. In what respect?

A. In respect to its strength, and the strength that it adds to the slab, its concrete, used for the outer support of the walls, and also for the ornamental and artistic uses.

Q. How does a stone, one of these stones, placed as veneer on the wall of a building, add to its strength?

A. The veneer of a wall of a building is usually laced with steel reinforcing rods, and these stones are put in place in the outside, and they are cemented together, and they are of much better strength than the cement itself with the structural line steel.

Q. Again I ask you, doesn't other building stone serve the same purpose?

A. It does not give the same strength nor the same artistic appearance." (Tr. 68-70.)

This testimony tends to confirm, rather than to refute, Ryman's testimony. It shows that the building stone on the claims is used for the same purpose as other varieties of building stone on the market and it does not show that it commands a higher price for the same use. Accordingly, we have little difficulty in concluding from the evidence before us that driftwood stone and driftstone veneer are common varieties of building stone which have not been subject to mining location since July 23, 1955.

The significance of the foregoing conclusion, however, is somewhat beclouded in this case by the fact that the mineral deposits found on the claims are alleged to be valuable for uses other than as building stone and, because of such value, to constitute valuable mineral deposits which are still subject to location under the mining laws.

It is readily apparent that some minerals may be common or uncommon varieties depending upon the form in which they occur and the uses for which they are suited. For example, metallurgical or chemical grade limestone is expressly recognized by departmental regulation (43 CFR 3511.1(b)) as being excepted from the category of "common varieties". On the other hand, limestone material useful only as rubble in building construction is a common variety of mineral not subject to mining location. United States v. E. M. Johnson et al., supra.

There is evidence in the record that some of the minerals found on the claims in question meet specifications which would except them from the category of "common varieties". Appellants' witness Stewart testified that the limestone found on the claims is chemical grade limestone (Tr. 58) and that wollastonite of the type found on the claims can be beneficiated, sold and used in industry (Tr. 67-68). Although not expressly concurred in, Stewart's views were not refuted by any evidence presented by the Government. (See Tr. 79-83.)

It is not sufficient, however, merely to establish the fact that the mineral deposits in question are uncommon varieties. Limestone, dolomite and wollastonite are minerals of widespread occurrence the marketability of which must be shown in order to establish the discovery of a valuable mineral deposit. Moreover, it is not enough to show that a market exists for a particular mineral and that a particular deposit of that mineral is of such quality as to satisfy the standards of that market. It must be shown, in addition, that the particular deposit itself can be mined and marketed at a profit. See, e.g., Foster v. Seaton, supra; Big Pine Mining Corporation, 53 I.D. 410 (1931); United States v. Estate of Victor E. Hanny, 63 I.D. 369 (1956); United States v. Pumice Sales Corporation etc., A-27578 (July 28, 1958); United States v. Francis N.

Dloughy et al., A-27668 (September 24, 1958), sustained in Francis N. Dloughy v. Fred A. Seaton, Civil No. 405-59, in the United States District Court for the District of Columbia (May 3, 1960); United States v. G. C. (Tom) Mulkern, A-27746 (January 19, 1959), affirmed in Mulkern v. Hammitt, 326 F. 2d 896 (9th Cir. 1964); United States v. Keith J. Humphries, A-30239 (April 16, 1965).

After careful review of the record, we find the evidence contained therein to be inconclusive as to the marketability of the limestone, dolomite and wollastonite deposits on the claims and, hence, inconclusive as to the merit of the second charge of the complaints, i.e., that valuable "minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws." We do not find in the testimony of the Government's witness, Ryman, the admission cited by appellants "that there would undoubtedly be a market for the limestone around the Brawley area for its sugar refineries due to the fact that the closest source of supply for the sugar refineries was Henderson, Nevada."9/ On the other hand, there is no

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9/ Ryman's testimony with respect to the marketability of the limestone was as follows:

"Q. [by Mr. Wheatley] From the area in which these claims are located, where would the market be for the sale of limestone from these claims?

A. One possible market might be the sugar refineries around the Brawley area.

Q. Would that be the closest?

A. I would say that would be the closest market. I don't know where these glass manufacturers are situated throughout Southern California.

Q. Are there limestone deposits in and around Brawley?

A. I understand that Brawley -- I talked to the Holly Sugar Company in Brawley, and they get their limestone at this time from near Boulder, I think it's Henderson, Nevada.

Of course, other large consumers would be the steel mills, Kaiser Steel for one.

There is a market for limestone in Southern California, a considerable market, and it is being supplied from both within and without Southern California. Many of these markets are captive markets, the consumers own their own deposits and they produce from them. Many of the consumers have certain specifications and their processes are set up to use a particular type of limestone. The cost of the

positive statement in his testimony that the limestone and other mineral deposits on the claims are not marketable. His opinion that the minerals are not marketable appears to be based primarily upon his observations of the work that appellants have done upon the claims rather than upon evaluation of the mineral deposits themselves.

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footnote 9 continued

> limestone is a very small part of the whole process, but reorganizing the whole process to use a different limestone to get a better rate on the limestone might be more costly than to continue to use the same type that they are using.
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> That's true in the paper pulp industry and the sugar industry. They want a limestone that doesn't add any taste to the sugar. It's used in the refinery processes. They use both calcia and carbon dioxide, and some refineries are working on processes where they use the carbon dioxide to precipitate out the calcium again through some of their processes and they wind up with a calcium carbonate filter cake, and they are working on processes where they can recirculate and use the material all over again. Now, this is not being done near Brawley, however. They are still buying limestone.
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> Q. In your opinion can limestone be produced from these claims and taken to the market and be sold in competition, to meet the competition, rather, of the limestone which is located more closely to the point of consumption?
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> * * *
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> The Witness: The material may be chemically suitable for some uses. I have no way of knowing. I don't know what their problems would be in producing the material and what their costs would be in delivering the product to specifications of the consumer. But there is very little development work done within these claims for the limestone material or dolomite or wollastonite. In fact, you could say there is none.
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> The Witness: In order for Mr. DeZan to enter into any of these other markets he would have to break into a market that is already being filled from a known source. He would have to show that he had developed an area and that he would be able to deliver consistently the grade that they require for that particular use.
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> Now, these consumers of limestone and these other materials are already being supplied for the uses of wollastonite. They use limestone for the same use, as a paint filler and

In support of a finding that the minerals on the claims are marketable, we see evidence (1) that the limestone deposits found on the claims are of a quality that is marketable 10/ and (2) that the Holly Sugar Company in Brawley, California, gets limestone from Henderson, Nevada, which is much farther away than appellants' claims. In support of a contrary finding, there is testimony (1) that the market is being fully supplied from other sources, (2) that much of that market is a captive market, (3) that many consumers have processes which are set up to use only a particular type of limestone, and (4) that appellants' claims would, in any event, have to compete with other sources of limestone for any part of the available market. 11/

None of this evidence, however, goes far toward establishing a basis for a sound conclusion with respect to the marketability of the mineral deposits in question. There is no evidence whatsoever in the record with respect to mining, processing, or transportation costs, factors of the utmost importance to a determination of the practical economic value of any mineral deposit. Nor is there any evidence, beyond testimony that the limestone on the Driftwood and Driftstone Veneer claims is low

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footnote 9 continued

> extender. Wollastonite has certain properties that makes it more desirable. It has a long fiber and it adds toughness for ceramics and some of these fillers and tiles. However, these users may be satisfied to use a different filler from a different source due to the price differential.
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> I would say there was insufficient development or even sampling within the claim area to justify any conclusions on whether a commercial deposit or a valuable deposit of the material has been found." Tr. 81-85.

Beyond this testimony, there is no evidence in the record relating to a specific market for the minerals found on these particular claims.

10/ That is, there is evidence as to the quality of the deposits found on three of the claims. There is no evidence in the record with respect to the quality of the limestone found on any of the Blondie claims.

11/ Ryman's statement that he believed "that any contracts that Mr. DeZan might enter into would be delivered from existing stockpiles that he has in the Big Maria Mountains" was admitted over the objection of appellants' counsel. Although Ryman's belief does little toward proving or disproving the marketability of limestone from either source, we concur with the hearing examiner that evidence of the existence of other nearby possible sources of limestone is relevant to the question of the marketability of the deposits under consideration.

in impurities, as to whether or not the minerals found on the claims possess qualities that would give them a competitive advantage over more accessible deposits.12/

In the absence of more specific factual data, a satisfactory conclusion with respect to the marketability of the subject mineral deposits cannot be made, for a determination that those deposits are or are not marketable would require a degree of conjecture that does not seem warranted. Accordingly, we find that the case should be remanded for further hearing on the question of discovery of valuable deposits of limestone, dolomite and wollastonite. In view of this determination, we find it unnecessary to consider the questions raised by appellants' charge that they were denied an adequate opportunity to defend their claims.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a): 24 F.R. 1348), the decision appealed from is affirmed insofar as it held driftwood stone and driftstone veneer to be common varieties of building stone, and it is set aside insofar as it held that no discovery had been made of a valuable deposit of limestone, dolomite or wollastonite, and the case is remanded to the Bureau of Land Management for further action consistent with this decision.

Ernest F. Hom

Ernest F. Hom
Assistant Solicitor
Land Appeals

12/ According to evidence submitted by appellants (Ex. P):

> "Limestone and dolomite are both low-priced commodities which must be produced reasonably near to centers of consumption or transportation costs become prohibitive. With but few exceptions, limestone and dolomite are produced within 150 miles of consuming centers. The one exception insofar as California is concerned is U.S. Lime Products' operation in and near Henderson, Nevada which supplies limestone and dolomite to southern California. This Nevada rock is a non-decrepitating variety used by sugar refineries and steel mills which require material that will retain a lump shape during calcination. Rock having this characteristic was not being produced in southern California in 1956." California Division of Mines Bulletin 176, p. 302.

The record contains no evidence that the limestone found on appellants' claims possesses the peculiar quality attributed to the Nevada limestone, in the absence of which, apparently, the distance factor would be a significant one.